Filed 9/30/02 P. v. Rogers CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONALD ARTHUR ROGERS, Defendant and Appellant.	G027202 (Super. Ct. No. M-7759) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Daniel J. Didier, Judge. Affirmed.

Chris Truax, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Janelle Boustany and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Ronald Rogers appeals from an order of commitment under the Sexually Violent Predators Act. (Welf. & Inst. Code, § 6600 et seq. (SVPA, or Act).)[1] Defendant attacks the Act on three different constitutional grounds, two of which have been decided against him by the United States Supreme Court and the California Supreme Court. The third argument, based on equal protection, has no merit. Defendant also contends the People were not entitled to use two new experts at trial in place of the experts who evaluated him for the probable cause hearing, even though the original experts were terminated by the Department of Mental Health before trial. Defendant insists the trial court violated his right to confidential treatment when it allowed the new psychologists to review his treatment records. For the reasons stated below, we affirm.

I

Both the attorney general and appellant turn almost immediately in their briefs to the legal issues, pausing to recite the relevant facts in three or fewer paragraphs each. This case calls for no more, and we will do the same. (Cf. *People v. Garcia* (2002) 97 Cal.App.4th 847.)

Following two incidents in 1987 where defendant assaulted one woman in his car with a cast he was wearing on his arm, forced her to orally copulate him, and made her remove her pants at knifepoint, and then picked up another woman "for 'sex'" and beat her with his cast, defendant pleaded guilty to one count of false imprisonment. In 1989, defendant was convicted on two counts of forcible oral copulation and one count of rape against three separate victims. All five women in the 1987 and 1989 incidents were prostitutes. Prior to defendant's scheduled release from prison in 1996, the district

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

attorney filed a petition to commit him civilly to the care and custody of the Department of Mental Health for a two-year period under the SVPA.

At the probable cause hearing in December 1997 two psychologists, Melvin Macomber and Dean Clair, testified defendant had multiple mental disorders and was likely to reoffend. The trial court found probable cause existed and set a trial date. At trial, more than two years later in March 2000, two new psychologists testified defendant: (1) suffered from paraphilia[2] and anti-social personality disorder, (2) that he was likely to reoffend, and (3) that he met all the criteria of a sexually violent predator. (We will briefly review the facts regarding how these trial experts replaced the two experts terminated after the probable cause hearing in our discussion below.) The jury made a true finding that defendant was a sexually violent predator within the meaning of the SVPA, and the court committed him. Defendant filed this appeal but during its pendency escaped from Atascadero State Hospital. Respondent moved to dismiss the appeal, but defendant has been returned to custody. We grant respondent's motion to withdraw its motion to dismiss the appeal, and now reach the merits.

II

Constitutional Claims

Defendant argues the SVPA is constitutionally infirm because of a drafting error that renders the Act "inherently contradictory." He notes that though the standard for detention at the probable cause hearing is whether the defendant is "likely to engage

---

[2] "Paraphilia" is an "addiction to unusual sexual practices." (Webster's 3d New Internat. Dict. (1965) p. 1638, col. 3.) "[T]he diagnostic features" of the particular paraphilia afflicting defendant were "intense sexual arousing fantasies generally involving non-consenting persons that occur over a period of at least six months [wherein] the behavioral sexual urges or fantasies cause clinically significant distress or impairment in social, occupational or other important areas of functioning," according to the testimony of one of the experts.

in sexually violent *predatory* criminal behavior upon his or her release" (§ 6602, italics added), and the Act specifically defines "predatory" as an act "directed toward a stranger [or] casual acquaintance . . ." (§ 6600, subd. (e)), the operative language of the Act allows for commitment if "it is likely that [the defendant] will engage in *sexually violent criminal behavior*" (§ 6600, subd. (a)(1), italics added), rather than "sexually violent *predatory* criminal behavior." In defendant's words: "To put it simply, appellant's jury was allowed to find he was a 'sexually violent predator' without ever finding that he was likely to be 'predatory.'" Defendant argues this drafting error and resulting instructional defect amount to per se structural error rather than harmless error.

The California Supreme Court recently addressed the issue posed by defendant and concluded that, as a predicate to commitment under the SVPA, "the trier of fact must find, beyond a reasonable doubt, that the defendant is likely to commit sexually violent *predatory* behavior upon release." (See *People v. Hurtado* (2002) 28 Cal.4th 1179, 1182 (*Hurtado*), italics in original.) But the Court nonetheless affirmed the trial court's commitment order in that case on harmless error grounds, rejecting the argument that failure to instruct the jury properly amounted to structural error. (*Id.* at pp. 1190-1194.) The same result obtains here.

In finding harmless error in *Hurtado*, the Supreme Court noted that "All three [child] victims were strangers to defendant, which means that defendant's acts were 'predatory acts' as defined in section 6600, subdivision (e) . . . ," and further noted that the defendant admitted "he continued to have sexual fantasies about children." (*Hurtado*, *supra*, 28 Cal.4th at p. 1194.) "Thus," the Court concluded, "there was ample evidence to show that defendant was likely to commit future violent sexual acts, and none to indicate that his victims would not include strangers, casual acquaintances, or persons

cultivated for victimization." (*Ibid.*) Here, the evidence was undisputed that Rogers committed sexually violent predatory offenses against strangers (the five prostitutes) and one expert specifically opined that, if released, defendant would "likely . . . commit a new sexually violent predatory-type crime." Hence, like the Supreme Court in *Hurtado*, we "therefore conclude that the trial court's instructional error was harmless beyond a reasonable doubt." (*Ibid.*)

Defendant raises an argument not contemplated in *Hurtado*, namely, the instructional error regarding predation could not be harmless because "that failure was only a manifestation of the underlying problem—the complete failure to put the defendant on notice that a finding on the predatory element was required." Defendant suggests this lack of notice prejudiced him in that he "had no incentive to contest the [predation] point, to present evidence concerning it, to cross-examine prosecution witnesses on it or even argue the point in closing argument." Albeit creative, this argument fails. Defendant was on notice to dispute the likelihood that he would "engage in sexually violent criminal behavior" (§ 6600, subd. (a)(1)), a broad category that encompasses the specifically predatory behavior for which he was previously convicted and from which arose the possibility of commitment. Moreover, defendant does not suggest, if notice had been given more precisely as to predation, that he would have or could have contested the predatory convictions to which he stipulated. His contention that he was prejudiced by lack of notice is purely speculative. (*Kauffman v. DeMutiis* (1948) 31 Cal.2d 429, 432 ["where a situation arises which might constitute legal surprise, counsel cannot speculate on a favorable verdict . . ."].) This rule applies generally in criminal cases. (*People v. Wrigley* (1968) 69 Cal.2d 149, 159-160.) Because defendant did not raise the issue below it is now waived. (*Ibid.; People v. Memro* (1995)

11 Cal.4th 786, 869.) Even if we were to reach this issue, we would find the error was harmless. (See *Chapman v. California* (1967) 386 U.S. 18.)

Defendant's second major contention is that the SVPA is unconstitutional because it does not require the jury to find the defendant suffered from a "volitional impairment rendering him dangerous beyond his control." (Initial capitalization removed.) In support of this proposition, defendant relies on *Kansas v. Hendricks* (1997) 521 U.S. 346, 358 (*Hendricks*). As a distant corollary to this argument, defendant complains the trial court committed prejudicial error when it refused to instruct the jury on the meaning of "likely" in determining whether "it is likely [the defendant] will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) The United States Supreme Court has squarely answered the first question against defendant, and the California Supreme Court recently defined the term "likely" in such a way that any potential error in failing to instruct on it was harmless.

In *Kansas v. Crane* (2002) 534 U.S. 407, the United States Supreme Court reviewed a Kansas Supreme Court decision that interpreted *Hendricks* to hold "'a finding that the defendant cannot control his dangerous behavior'" is a constitutional prerequisite to commitment under a sexually violent predation statute. (*Id.* at p. ___; 122 S.Ct. at p. 869.) *Crane* rejected that interpretation of *Hendricks* and the federal Constitution as "overly restrictive," clarifying: "It is enough to say that there must be proof of serious difficulty in controlling behavior." (*Id.* at p. ___; 122 S.Ct. at pp. 868, 870.) Given that CALJIC No. 4.19 requires the "diagnosed mental disorder" to "predispose[] the person to the commission of [predatory] criminal sexual acts" to *such* "*a degree* constituting the person a menace to the health and safety of others" (italics added), we agree with the observation that: "A finding that a defendant qualifies as a sexually violent predator . . .

necessarily means the defendant has serious difficulty in controlling his behavior." (*People v. Wollschlager* (2002) 99 Cal.App.4th 1303, 1305.)

Of course, it is the "degree" of seriousness of the mental disorder—and "not a particular [abstract] degree of dangerousness" apart from the mental condition—that "'distinguish[es] a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."'" (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 922, fn. 12 (quoting *Crane*, *supra*, 534 U.S. at p. ___; 122 S.Ct. at p. 870).) Thus, a sex offender "who *lacks a qualifying mental disorder* cannot be committed *no matter how high his or her risk of reoffense*." (*Ibid.*) But here there was ample evidence of a mental disorder that seriously impacted defendant's ability to control himself. For example, one expert testified defendant's paraphilia manifested itself in "a compulsivety" and a "driven[n]ess" to "be with individuals and force sexual behavior upon them." Despite the mangled English, the expert's diagnosis of a serious difficulty in controlling behavior is clear enough to meet the standard articulated in *Crane*. Defendant's second contention is therefore without merit.

The corollary to that contention is also without merit. Defendant contends the jury should have been instructed that "likely" means "more probable than not," in determining whether "it is likely that [the defendant] will engage in sexually violent [predatory] behavior." (§ 6600, subd. (a)(1).) In *Ghilotti*, the California Supreme Court recently acknowledged the word "is often defined in these terms (see, e.g., 8 Oxford English Dict. (2d ed. 1989) p. 949, col. 1; Webster's 3d New Internat. Dict. (1965) p. 1310, col. 3)," but concluded instead that "likely" as used in the SVPA requires a technical determination that the defendant "presents a *substantial danger*—that is, a

serious and well-founded risk—of reoffending . . . if free." (*Ghilotti*, *supra*, 27 Cal.4th at p. 916.) The Court explicitly rejected the "more probable than not" formulation advanced by defendant, stating that "likely," as used in the Act, "does not mean the risk of reoffense must be higher than 50 percent." (*Ibid.*)

Defendant is correct that the trial court is generally required to provide the jury with an amplifying instruction when a word has a technical definition that differs from the commonly used meaning. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) The defense attorney and the district attorney both asked for such an instruction, but the court refused. As it subsequently turned out, in light of the technical definition of "likely" settled upon in *Ghilotti*, this refusal was probably error. Our Supreme Court is currently considering the issue. (*People v. Roberge*, review granted March 28, 2001, S094627 (*Roberge*).) But whatever conclusion the Court reaches in *Roberge*, any error here was harmless.

"Jurors are presumed to understand [the] meaning and use of words in their common and ordinary application." (*Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 531.) If defendant is right (and we are inclined to think he is) that the common and ordinary meaning of "likely" is "more probable than not," and his jury understood the term in this manner, then he *could not* have been prejudiced that the statutory meaning, as determined in *Ghilotti*, is actually something *less than* "more probable than not." That is, defendant's jury committed him according to a standard that was *higher* than required by law. We are sensitive to the fact that, as defendant points out, "likely" sometimes means merely "has the potential for." (See *People v. Savedra* (1993) 15 Cal.App.4th 738, 744.) But neither the defense nor the prosecution suggested this meaning to the jury. The jury had no reason to deviate from the everyday meaning of

"likely" as "more probable than not," which benefited defendant rather than harmed him. Hence, any potential error in failing to instruct on the term "likely" was harmless.

Defendant's third argument of constitutional dimension is the SVPA violates equal protection because it is under-inclusive. Defendant notes the Act includes as a predicate offense Penal Code section 288, Lewd or Lascivious Acts Involving Children, but not the "more serious sexual offense," Penal Code section 288.5, Continuous Sexual Abuse of a Child, which applies to resident child molesters. The distinction arises, of course, from the Act's definition of a "predatory" act as one "directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization." (§ 6600, subd. (e).) In defendant's view, this distinction is not only "arbitrary" but also invidious because it allows for commitment of "those who have been convicted of violating Penal Code section 288 while those convicted of violating Penal Code section 288.5, a more serious crime, go free."

Even if we apply strict scrutiny, this argument has no merit. "Although equal protection does not demand that a statute apply equally to *all* persons, it does require that persons *similarly situated* with respect to the legitimate purpose of the law receive like treatment. [Citations.] If a statute is found to discriminate between similarly situated persons, the classification (in ordinary cases) must bear a rational relationship to a legitimate state purpose, or (in cases involving . . . fundamental interests) must be necessary to further a compelling state interest." (*College Area Renters & Landlord Assn. v. City of San Diego* (1996) 43 Cal.App.4th 677, 686.) Contrary to defendant's assertion, resident child molesters and those who prey sexually on strangers are not

similarly situated. The former pose a danger to those with whom they reside, and more specifically to children in the home, who are usually related by blood or marriage, such that the problem may often be addressed by removing the offender to prison temporarily or the child permanently. In contrast, sexual predators are a grave danger to the public at large. Predatory offenders may strike at any time or place and victimize anyone, and therefore pose a much greater threat. As the Supreme Court has said in rejecting equal protection challenges to the Act: "The SVPA is narrowly focused on a select group of violent criminal offenders who commit particular forms of predatory sex acts against both adults and children, and who are incarcerated at the time commitment proceedings begin. . . . The problem targeted by the Act is acute, and the state interests—protection of the public and mental health treatment—are compelling." (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1153, fn. 20.) Because the persons targeted by the SVPA and Penal Code section 288.5 are not similarly situated, there is no basis for finding an equal protection violation. This argument fails.

III

Replacement of Psychologists

Finally, defendant contends the trial court erred in allowing the psychologists who evaluated him for the probable cause hearing to be replaced by two new psychologists in evaluations done for trial. Recent, retroactive legislation disposes of this contention.

The italicized language that follows indicates the additions that were made in 2001 to section 6603, subdivision (c): "If the attorney petitioning for commitment under this article determines that updated evaluations are necessary in order to properly present the case for commitment, the attorney may request the State Department of

Mental Health to perform updated evaluations. If one or more of the original evaluators is no longer available to testify *for the petitioner* in court proceedings, the attorney petitioning for commitment under this article may request the State Department of Mental Health to perform replacement evaluations. When a request is made for updated or replacement *evaluations*, the State Department of Mental Health shall perform the requested evaluations and forward them to the petitioning attorney *and to the counsel for the person subject to this article*. However, updated or replacement evaluations shall not be performed except as necessary to update one or more of the original evaluations or to replace the evaluation of an evaluator *who* is no longer available *to testify for the petitioner in court proceedings*."

The 2001 amendment also added a new subsection to subdivision (c), explicitly providing that: "For the purposes of this subdivision, 'no longer available to testify for the petitioner in court proceedings' means that the evaluator is no longer authorized by the Director of Mental Health to perform evaluations regarding sexually violent predators as a result of any of the following: [¶] (A) The evaluator has failed to adhere to the protocol of the State Department of Mental Health. (B) The evaluator's license has been suspended or revoked. (C) The evaluator is unavailable pursuant to Section 240 of the Evidence Code." (§ 6603, subd. (c)(2).) The amendment further added: "Nothing in this section shall prevent the defense from presenting otherwise relevant and admissible evidence." (§ 6603, subd. (d).)

Regarding retroactivity, the Legislature declared: "It is the intent of the Legislature to . . . [¶] *[c]larify existing law* with respect to the authority of the Director of Mental Health to replace evaluators in sexually violent predator cases" and "that this act

apply retroactively to pending sexually violent predator cases as well as prospectively." (Stats. 2001, ch. 323, § 1(a)(1) and (b), italics added.)

The details regarding the termination of Macomber and Clair are not particularly clear or relevant. More importantly, defendant does not dispute they were fired for their "'inability to meet department SVP evaluation standards.'" As such, the updated evaluations performed by the new psychologists fall within section 6603's provision for new evaluations "to replace the evaluation of an evaluator *who* is no longer available *to testify for the petitioner in court proceedings*" because an original "evaluator has failed to adhere to the protocol of the State Department of Mental Health." (§ 6603, subds. (c)(1) & (c)(2)(A).) That is not to say the original evaluations were wholly inadmissible. As respondent points out, there was "no legal impediment to appellant calling these experts himself, if [they] . . . would have somehow benefit[t]ed appellant in his defense." Section 6603, subdivision (d) clarifies as much. But defendant chose not to call either Macomber or Clair to testify at trial. In any event, distinct from the termination of the first two experts, the two years and three months that elapsed between defendant's probable cause hearing and trial certainly justified the district attorney's request for updated evaluations. (§ 6603, subd. (c)(1).) There was no error in the court allowing the new evaluations. And therefore there was no error in allowing the new evaluators to review defendant's treatment files, in spite of their confidentiality for other purposes. (See § 6603, subd. (c)(1) ["These updated or replacement evaluations shall include review of available medical and psychological records, *including treatment records . . .*"].)

IV

The trial court's commitment order is affirmed.

ARONSON, J.

WE CONCUR:

SILLS, P.J.

O'LEARY, J.